No. 15885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. RUTHERFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition to Review a Decision of the United States District Court.

APPELLANT'S REPLY BRIEF.

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I.

The Court Should Have Granted the Motion to Suppress Evidence.

Appellee's Brief (p. 5) states the motion to suppress evidence was denied by the Court upon a finding that the facts submitted to the U. S. Comissioner were sufficient for the issuance of the search warrant.

However the Transcript of Record does not show such a finding. In fact, the Court in denying the motion held it was up to the Commissioner to make the determination and that the Court would not pass on the sufficiency of the evidence.

The ruling is in direct conflict with the authorities cited by appellant in his opening brief (pp. 6-7).

They are repeated here for the convenience of the Court.

No search warrant shall issue except upon probable cause supported by oath or affirmation.

United States Constitution, Fourth Amendment.

Probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.

Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035.

Where an affidavit in support of the issuance of a search warrant does not set out facts showing the required probable cause, the motion to suppress evidence seized as a result of the search warrant must be granted.

United States v. Lassoff, 147 Fed. Supp. 944.

The affidavit for the search warrant must state facts known to be true from observation. Courts should not validate writs issued on sworn declaration which literally comply with the terms of the Federal Statute on information and belief or conclusions, instead of positively alleging the material facts.

Ripper v. United States, 178 Fed. 24, 26 (8th Cir.);

Schencks v. United States, 2 F. 2d 185, 186, 187.

The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial.

Wagner v. United States, 8 F. 2d 581, 583 (8th Cir.);

Giles v. United States, 284 Fed. 208, 214 (1st Cir.).

The Commissioner must be furnished with facts—not observations, beliefs or surmises.

Veeder v. United States, 252 Fed. 414, 418 (7th Cir.).

When the validity of a warrant was before the Court of Appeals for the First Circuit in *Giles v. United States,* 284 Fed. 208, the Court said that the affidavit should have affirmatively appeared that the affiant had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the Commissioner.

Lockname v. United States, 2 F. 2d 427, 428 (9th Cir.);

Kohler v. United States, 9 F. 2d 23, 25 (9th Cir.).

A search warrant could issue only upon evidence which could be competent in a trial before a jury and of such a nature to lead a man of prudence and caution to believe that the offense had been committed.

Grau v. United States, 287 U. S. 124, 128.

Sworn general statements set forth in the affidavit are not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant, and therefore the warrant is void.

United States v. Lassoff, 147 Fed. Supp. 944, 949.

II.

The Evidence Was Not Sufficient to Establish the Guilt of the Appellant.

Appellee seeks to support the guilty finding on the theory that appellant was a principal (Appellee's Br. p. 8); it then makes the unsupported statement that there was ample evidence upon which to base the trial judge's finding that appellant was engaged in the business of receiving wagers (Appellee's Br. p. 9). The appellee does not state what evidence establishes beyond a reasonable doubt that appellant was engaged in the business of receiving wagers.

It is respectfully urged that the evidence only shows that the appellant picked up pieces of paper, was found in possession of purported bets on horse races and stated he figured the wins and losses for someone else. This does not establish him, beyond a reasonable doubt, as a principal, nor does it establish beyond a reasonable doubt that he wilfully and knowingly failed to register. It is incumbent on the prosecution to establish that the appellant knew he was required to register and pay a tax.

Appellee argues that appellant did not take the witness stand and failed to dispute the facts presented at the trial (Appellee's Br. p. 9). A defendant does not have to prove his innocence. The prosecution must establish the guilt beyond a reasonable doubt. It is not incumbent on a defendant to take the stand and dispute facts when the facts do not establish guilt as required by law.

Appellee refers to the statement of the defendant made to the officers as self-serving declarations (Appellee's Br. p. 9). However, appellee has not cited any authorities to counteract the principle of law that where the prosecution presents as part of its case defendant's statement, the prosecution is bound by that evidence in the absence of proof to the contrary.

People v. Coppla, 100 Cal. App. 2d 766, 769, 224 P. 2d 828;

People v. Griego, 136 Cal. App. 2d 51, 56, 288 P. 2d 175.

The conversation involved herein is that when the appellant was asked what he was doing with the papers he replied that he was just figuring the wins and losses and that he did not need a stamp because he was not a book maker [Tr. of Rec. p. 45]. The Government elected to introduce the evidence of the conversation and therefore it is bound by the conversation, in the absence of proof to the contrary.

III.

The Government Failed to Establish the Necessary Venue.

Appellee (Appellee's Br. p. 10) concedes that the venue of prosecution in this case is where the act of conducting the business of wagering is committed. It then proceeds to make the unsupported statement that there was ample evidence that appellant was engaged in the business of receiving wagers within the Southern District of California. However, appellee does not point out what evi-

dence shows that appellant was engaged in the business within the venue of the Court. The evidence merely established that the appellant was arrested within the venue of the Court and that papers containing purported bets were found in the apartment where he was arrested. The evidence does not show that the purported wagers were received within the venue of the Court, nor does it show that appellant was engaged as a principal in the business of accepting wagers.

Conclusion.

It is respectfully submitted that the judgment of conviction and the order denying appellant's motion for a new trial should be reversed and that the District Court be directed to suppress the evidence seized without a bonafide search warrant.

Respectfully submitted,

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